UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

CPM ACQUISITION CORPORATION
d/b/a CALIFORNIA PELLET MILL
Employer

and

LOCAL UNION NO. 1999, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION
Union

Case 25-RD-1537

and

RYAN C. POTTER
Petitioner

HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS AND RECOMMENDATION TO THE BOARD

Pursuant to a Stipulated Election Agreement, an election was conducted on March 15, 2010, among certain employees of the above-named Employer to determine whether or not they desired to be represented by the Union for the purposes of collective bargaining.[1]

At the election two ballots were challenged. The Board Agent challenged the ballot of Robert Dyer because his name did not appear on the eligibility list. The Union challenged the ballot of Christopher Watt, alleging that he was no longer employed on the date of the election. Therefore, the Union contends that Watt was not eligible to vote in the election. The challenged ballots are sufficient in number to affect the results of the election.[2]

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[1] The appropriate unit, as set forth in the Stipulated Election Agreement, is as follows:

All production and maintenance employees employed by the Employer at its Crawfordsville, Indiana facility; BUT EXCLUDING all office clerical employees, administrative employees, professional employees, technicians, service persons, and guards and supervisors as defined in the Act.

[2] The Tally of Ballots made available to the parties at the conclusion of the election shows the following results:

Approximate number of eligible voters	20
Number of void ballots	0
Number of votes cast for the Union	10
Number of votes cast against participating labor organization	8
Number of valid votes counted	18
Number of challenged ballots	2
Number of valid votes counted plus challenged ballots	20

Following an investigation of the challenged ballots, the Regional Director of Region Twenty-five issued his Report on Challenged Ballots, Order Directing Hearing, and Notice of Hearing. In his Report, the Regional Director ordered that a hearing be conducted before a hearing officer to resolve the issues of fact and credibility raised by the challenged ballots. Pursuant to this order, a hearing was conducted on April 26, 2010, in Indianapolis, Indiana.[3] The Petitioner, the Union, and the Employer were present at this hearing and, with representatives of their choosing, were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. The findings, conclusions, and recommendations herein are based upon the undersigned's consideration of the record as a whole and observation of the demeanor of the witnesses.[4]

I. FINDINGS AND CONCLUSIONS

The evidence, as discussed in more detail below, demonstrates that Robert Dyer did not begin performing bargaining unit work for the Employer until Monday, February 22, 2010. On the preceding Friday, February 19, 2010, Dyer was clearly engaged in activities which have been defined by the Board as "mere orientation and preliminaries." Therefore, I find and conclude that Robert Dyer was not yet employed and working by the February 21, 2010 eligibility date. Accordingly, I recommend that the challenge of Robert Dyer's ballot be sustained and that his ballot not be counted.

The evidence is similarly clear that Christopher Watt was no longer employed in the Employer's bargaining unit on either the eligibility date or the date of the election. While the Employer's Plant Manager, Carl Allis, had directed Watt's attention to the possibility of a leave of absence and subsequently approved Watt's request for a leave of absence, the evidence demonstrates that, as of the eligibility date, Watt had been recalled to full-time employment with Caterpillar and had voluntarily resigned his employment with California Pellet Mill in favor of the higher wages offered by his former employer. Therefore, I find and conclude that Christopher Watt was not employed and working for the Employer on either the February 21, 2010 eligibility date or the date of the election, March 15, 2010. Accordingly, I recommend that the challenge of Christopher Watt's ballot be sustained and that his ballot not be counted.

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[3] All dates hereafter are 2010, unless noted otherwise.

[4] The absence of a stated credibility resolution regarding a conflict in specific testimony, or the absence of an analysis of such testimony, does not mean that such consideration did not occur. See ABC Specialty Foods, Inc., 234 NLRB 475 (1978); Bishop and Malco., Inc. d/b/a Walker's, 159 NLRB 1159 (1966); Trumbull Asphalt Co. of Delaware v. NLRB, 314 F.2d 382, 383 (CA7 1963), cert. den. 374 U.S. 808 (1963), citing as authority U.S. v. Pierce Auto Lines, 327 U.S. 515, 529 (1946). The Board has long held that the failure of the trier of fact to detail completely all conflicts in the evidence does not mean that this conflicting evidence was not considered and he is not compelled to annotate each such finding. Borman, Inc., 273 NLRB 312 (1984); Walker's, supra. To the extent that the particular testimony of a witness does not conform to the facts recounted herein, that testimony is discredited and found unreliable.

II. THE CHALLENGED BALLOTS

A. Robert Dyer

1. Issues

Although the Board Agent initially challenged the ballot of Robert Dyer because his name did not appear on the eligibility list, the Union maintained the challenge and contends that Dyer was not employed by the Employer prior to the February 21, 2010 eligibility date, and therefore, the challenge to the ballot of Dyer should be sustained and the ballot should not be counted. The Employer, however, contends that Dyer's employment began on February 19, prior to the February 21, 2010 eligibility date, and that he was inadvertently left off the eligibility list. Therefore, the Employer contends that he was an eligible voter. The Petitioner contends that Dyer was an eligible voter as he had been hired to replace a retiring employee who was an eligible voter and because Dyer, himself, had established seniority and a right to have his vote counted based upon his continued employment interests with the Company.

2. Statement of Facts

Robert Dyer spent approximately an hour and a half at the Employer's facility on Friday, February 19, 2010. During that timeframe, he interviewed with Plant Manager Carl Allis for a machine operator position; was offered employment; met with a supervisor, who provided a tour of the factory, a demonstration on how to manufacture dyes and a review of his responsibilities; and completed new employee paperwork to include, among possibly other documents, an application, a W-2 form, and a life insurance form. In all, Dyer spent approximately 30 minutes engaged in completing paperwork, in the office area, and approximately 1 hour touring the plant. Dyer did not complete any bargaining unit work on February 19. However, Dyer did receive a few minutes of training on his job duties. As such, while he was not permitted to actually sharpen a drill or to load dyes into the machines, as required by the job itself, he was permitted to spend about five or ten minutes handling the equipment that he would be using on the job. Dyer was not paid for his time spent at the Employer's facility on February 19, 2010.

The payroll eligibility date for the March 15, 2010 election was February 21, 2010. The consistent testimony from Plant Manager Carl Allis and Robert Dyer, himself, was that Dyer began performing bargaining unit work on February 22, 2010. Dyer's Pay Roll Change Notice reflected his first day of service as February 22, 2010.

3. Analysis

For its part, the Employer argues that Robert Dyer was hired on February 19, 2010 and that the approximate one hour and thirty minute period that Dyer spent on site applying for work on that date, completing paperwork (including benefits and insurance documents which would have provided coverage to him effective February 19), orientation, training and a workplace tour, constituted important activities that could have been completed on his first day of work except that the parties opted to complete them on February 19, 2010. The Employer further argues that although Dyer's hire/seniority date was February 19, 2010, Plant Manager Allis dated Dyer's Pay Roll Change Notice February 22, 2010 because that was the date that Allis completed the form and because that was the first day that Dyer was going to perform actual services at the factory. Finally, it was argued that it

was simply an oversight on Allis's part that Dyer was left off the February 21, 2010 eligibility list that was provided to the Board in preparation for the March 15, 2010 election.

In support of its position, the Employer cites *CWM, Inc*. 306 NLRB 495 (1992), wherein the Board overruled the challenges to five employees' ballots and found that they were both "employed" and "working" prior to the payroll eligibility date. *CWM, Inc*. can be easily distinguished from the fact pattern presented in the instant case, however. The employees addressed therein were involved in a week-long training program, which was required by Federal and state laws. Further, the employer's training program was comprehensive and substantive in nature, as opposed to merely involving orientation or "preliminaries" and the employees were released to work on the job and would have completed work within the eligibility period were it not for their failure to have adequate protective equipment. Robert Dyer, on the other hand, admittedly spent the bulk of his time at the Employer's facility on February 19, 2010 engaged in interviewing and completing various other activities to include necessary paperwork, orientation, and a workplace tour. As noted above, Dyer did not engage in bargaining unit work on Friday, February 19. His bargaining unit work did not commence until the following Monday, February 22, 2010.

It is settled that, to be eligible to vote in a Board-conducted election, the employee must be employed and working on the eligibility date, unless the employee is absent for one of the reasons set out in the Stipulation or Direction of Election. *Ra-Rich Mfg. Corp*., 120 NLRB 1444, 1447 (1958). The Board defines "working" under this "hired and working" requirement as meaning "actual performance of bargaining unit work," excluding "participation in training, orientation or other preliminaries." *Emro Marketing Co.* 269 NLRB 926 (1984); *Roy N. Lotspeich Publishing Co*., 204 NLRB 517 (1973). The Board's so-called pre-work rule has two purposes: it operates as a prophylactic against an employer's manipulation of an election by hiring employees favorable to its position just prior to the election and it provides a simple and fair means of determining whether newly hired employees are part of the bargaining unit. *NLRB v. Tom Wood Datsun, Inc.* 767 F.2d 350 (7th Cir. 1985) enfg. 270 NLRB No. 162 (1984).

Beyond the foregoing arguments, the Employer points to the fact that the Union was provided immediate access to Robert Dyer. Therefore, it is argued, Dyer was made aware of Union meetings and the Union was able to share information with him concerning the upcoming election. The fact that Dyer shared a community of interest with other bargaining unit members was also raised and *NLRB v. Certified Testing Labs, Inc*. 387 F2d 275, enfg. 159 NLRB 881 (1966), was cited as supporting case law. The test applied by the Board in this matter, however, is whether or not the employee is hired and working on the eligibility date in question.

As noted above, the Petitioner contends that Robert Dyer was an eligible voter as he had been hired to replace a retiring employee who was an eligible voter and because Dyer, himself, had established seniority and a right to have his vote counted based upon his continued employment interests with the Company. The evidence, however, demonstrates that Dyer was not employed and performing bargaining unit work for the Employer by the established eligibility date, which is the criteria used by the Board to determine eligibility.

Based upon the evidence presented during the course of the hearing and the above analysis, the Union has met its burden of proving that Robert Dyer was not employed and working at the time of the payroll eligibility date. Therefore, the challenge to Dyer's ballot should be sustained and the ballot should not be counted.

B. Christopher Watt

1. Issues

The Union challenged the ballot of Christopher Watt and contends that he was no longer employed by the Employer on the date of the March 15, 2010 election. Therefore, the Union avers, the challenge to the ballot of Watt should be sustained and the ballot should not be counted. The Employer contends that Watt was on an approved leave of absence at the time of the election and, therefore, argues that Watt was an eligible voter. The Petitioner contends that Watt was an eligible voter as he had been hired to replace a retiring employee who was an eligible voter and because Watt, himself, had established seniority and a right to have his vote counted based upon his continued employment interests with the Company.

2. Statement of Facts

Christopher Watt began work for the Employer on January 11, 2010. On February 11, 2010, Watt initiated a conversation with Plant Manager Allis in which he stated that he had been offered the opportunity to return to work at his former employer, Caterpillar. Watt went on to explain that he had a wife and three kids and that they were "not making it" on the $12.92 an hour wage that he was paid through California Pellet Mill. The two agreed to continue the conversation on the following day.

On the following day, February 12, 2010, the two continued their conversation. Christopher Watt informed Carl Allis that he was leaving his employment with California Pellet Mill in order to obtain the higher wages offered by returning to work with Caterpillar. After Allis mentioned the possibility of Watt taking a leave of absence, Watt requested the opportunity. Watt stated that he would like the opportunity to return to work for the Employer if things did not work out at Caterpillar or if it was possible for the Employer to offer him more money. Allis informed Watt that it was not possible for the Employer to offer him more money. Ultimately, it was agreed that should Watt fail to appear for work on the following Monday, February 15, 2010, it would be understood that he had opted to return to work at Caterpillar and that he had accepted the 30-day leave of absence from California Pellet Mill. On Monday, February 15, 2010, Watt failed to appear for work and Allis did, in fact, send a letter to Watt notifying him that he had been placed on a leave of absence extending from February 15, 2010 through March 16, 2010. Watt was informed that he would have to return to work no later than the following Monday, March 22, 2010.

On March 11, 2010, Christopher Watt again contacted Carl Allis and requested an extension to his leave of absence. After a discussion about Watt's continued interest in potential employment with California Pellet Mill, considering his commute time to Caterpillar, Allis again informed Watt that he could not offer him more than $12.92 an hour. In the end, Watt's leave was extended for an indefinite period of time. The election was conducted on March 15, 2010, at which time Watt's ballot was challenged by the Union. Watt had not returned to work as of the April 26, 2010 hearing.

It may also be noted that Section 20(d) of the parties' collective bargaining agreement provides that "Any employee may be granted a personal leave of absence for up to thirty (30) days at the sole discretion of Management." The record, however, provides only two examples of employees whose leave exceeded 30 days in duration. The record does not reflect that either of those cases involved employment outside California Pellet Mill as the basis for the extended leave.

3. Analysis

The Employer asserts that Christopher Watt was on an approved leave of absence at the time of the election, that he was in continued communication with management concerning his job, and that the leave of absence was compliant with the terms of the parties' collective bargaining agreement. The Employer, it is argued, kept the door open for Watt and expected that he may return to work even up to the day of the election. A replacement was not hired to fill his position.

NLRB v. Atkinson Dredging Company, 329 F2d 158, enfg. 141 NLRB 1316 (1963) was cited by the Employer as a basis for employees' eligibility to vote in an election where employees are on a leave of absence and will be restored to their former duties and responsibilities upon their return to work. *Mrs. Baird's Bakeries*, 323 NLRB 607 (1997) was also cited as a basis for counting Watt's ballot, arguing that where an employee's leave from the bargaining unit is of a definite duration, as Watt's initially was, the Board considers it more likely that the employee will return to work. In citing *Thomas Engine Corp*., 196 NLRB 706 (1972), the Employer also points to the fact that it is the situation as it stands on the election date, with the door open and Watt able to return to work that counts, not at any other time.

The foregoing cases, cited by the Employer, can be distinguished from Christopher Watt's situation. The situation addressed herein is not that of a layoff in which the Employer may or may not be inclined to call an employee back to work should business improve. The question is not whether or not the employee has a reasonable expectation of recall, as was the case in *Atkinson Dredging Company*, supra. The question is not whether or not the employee will likely be returned to the bargaining unit, as was the case in *Mrs. Baird's Bakeries*, supra. Rather, in this situation, Watt left the employ of California Pellet Mill in favor of the higher wages offered by his former employer, Caterpillar. Watt made that decision despite the fact that such a career move necessarily entailed both a longer commute to work as well as less time with his family, as the testimony indicated. Nevertheless, despite the Employer's willingness to hold a door open for him to return to work, going so far as to offer him the same pay, benefits, and seniority date should he opt to return to work, Watt voluntarily left California Pellet Mill's employ prior to the eligibility date and the election in favor of a higher paying job and had not returned as of the April 26, 2010 hearing. I find that Watt resigned. It was not the Employer's decision to remove him from his position within the bargaining unit but Watt's own action.

Board law pertaining to resignations, obtaining full-time employment elsewhere, be it during a strike, a layoff or otherwise is rather clear. The employee is considered to have resigned his/her employment and is no longer considered an eligible voter. I find that is the case in this situation. Christopher Watt resigned his employment with California Pellet Mill in order to reclaim his position with Caterpillar. The Employer's willingness to allow him to return to work, initially after a 30-day leave of absence and later, apparently, indefinitely, does not change the fact that he opted to resign his employment there in exchange for full-time employment elsewhere. See, for example, *Yawman & Erbe of California Corp*., 232 NLRB 935 (1977) and *M & S Morenci Corp*., 100 NLRB 1114 (1952). In *Yawman & Erbe of California Corp*. the Board addressed a nearly identical fact pattern. The employer, in that case, asserted that the employee in question was on an approved leave of absence for an indefinite period of time and the petitioner asserted that the voter had obtained employment elsewhere. The Board sustained the challenge to the voter's ballot based upon those facts. In this case, Plant Manager Allis similarly extended Watt's leave of absence for an indefinite period of time in the days leading up to the March 15, 2010 election. In *M & S Morenci Corp*. the Board overruled the challenges of ballots cast by employees who had found temporary employment elsewhere during a

layoff but sustained the challenge to the ballot of an employee who had obtained permanent employment elsewhere.

As noted above, the Petitioner contends that Christopher Watt was an eligible voter as he had been hired to replace a retiring employee who was an eligible voter and because Watt, himself, had established seniority and a right to have his vote counted based upon his continued employment interests with the Company. The evidence, as described above, however, demonstrates that Watt was no longer employed and working for the Employer on the February 21, 2010 eligibility date or at the time of the March 15, 2010 election.

Based upon the evidence presented during the hearing and the above analysis, the Union has met its burden of proving that Christopher Watt had effectively resigned his employment with California Pellet Mill as of the March 15, 2010 election. Therefore, the challenge to Watt's ballot should be sustained and the ballot should not be counted.

III. RECOMMENDATION TO THE BOARD

Based upon the above findings and conclusions, I recommend that:

1. the challenge to the ballot of employee Robert Dyer be sustained and that his ballot neither be opened nor counted; and

2. the challenge to the ballot of employee Christopher Watt be sustained and that his ballot neither be opened nor counted; and

3. a Revised Tally of Ballots and appropriate Certification of Representative issue.

IV. APPEAL PROCEDURE

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 - 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on Friday, June 4, 2010, at 5 p.m. (ET)**,** unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

ISSUED at Indianapolis, Indiana this 21st day of May 2010.

Roger V. Chastain, III
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